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IN THE

Supreme Court of the United States

October Term, 1975

Docket No. **75-496**

REGIONAL HIGH SCHOOL DISTRICT NO. 5, REGIONAL BOARD OF EDUCATION OF REGIONAL HIGH SCHOOL DISTRICT NO. 5, HENRY W. BENEDICT, as Treasurer of the Town of Bethany, JAMES BERRY, as Treasurer of the Town of Woodbridge, SIDNEY SVIRSKY, as Town Clerk of the Town of Bethany, and JEAN HANNA, as Town Clerk of the Town of Woodbridge,

Petitioners,

vs.

JOHN E. BAKER and GERALDINE S. GEORGE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

S. ROBERT JELLEY,
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GERALD P. DWYER,
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New Haven, Connecticut 06510.

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IN THE

Supreme Court of the United States

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No.

REGIONAL HIGH SCHOOL DISTRICT NO. 5, REGIONAL BOARD OF EDUCATION OF REGIONAL HIGH SCHOOL DISTRICT NO. 5, HENRY W. BENEDICT, as Treasurer of the Town of Bethany, JAMES BERRY, as Treasurer of the Town of Woodbridge, SIDNEY SVIRSKY, as Town Clerk of the Town of Bethany, and JEAN HANNA, as Town Clerk of the Town of Woodbridge,

Petitioners,

VS.

JOHN E. BAKER and GERALDINE S. GEORGE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Regional High School District No. 5, Regional Board of Education of Regional High School District No. 5, Henry W. Benedict, James Berry, Sidney Svirsky and Jean Hanna petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered July 23, 1975, affirming a judgment of the United States District Court for the District of Connecticut entered January 8, 1975.

Opinions Below

The opinion of the Court of Appeals, dated July 23, 1975 (Appendix I, *infra*, pp. 1a-8a), is not yet reported. The opinion of the District Court, dated November 22, 1974 (Appendix III, *infra*, pp. 11a-20a), is not reported.

Jurisdiction

The judgment of the Court of Appeals (Appendix II, *infra*, pp. 9a-10a) was entered on July 23, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the one person-one vote principle has application to the board of education of a regional school district comprising towns of unequal population where:

> (a) the board of education of the district has significantly fewer powers than the board in *Hadley* v. *Junior College District*, 397 U.S. 50 (1970),
>
> (b) the powers of the board of education are effectively controlled by the regional district meeting and by the referendum, both of which embody the one person-one vote principle in its purest form, and
>
> (c) the board members are elected by town meetings in each of the towns rather than by individual voters at town elections.

2. Whether there is present the necessary standing, justiciability, and jurisdiction to raise the one person-one vote issue where the suit was really instituted by the

regional school district's largest town, which chose the plaintiffs, announced that it had "authorized its attorneys" to bring the suit, and is paying for the suit.

Constitutional Provision Involved

The United States Constitution, Amendment XIV, §1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Regional High School District No. 5 comprises the three towns of Orange (population 13,524), Woodbridge (population 7,673), and Bethany (population 3,857), which are suburbs of New Haven, Connecticut. District No. 5 provides the educational program for grades 7 through 12 in the District.[1] The average number of pupils in the District is 3,377, with 1,835 from Orange, 998 from Woodbridge, and 543 from Bethany. For the school year 1972-73, Orange contributed 55.04% of the District's budget, Woodbridge contributed 29.34%, and Bethany contributed 15.62%.

District No. 5 is one of the sixteen regional school districts in Connecticut, and those sixteen districts comprise 44 of the 169 towns into which Connecticut is divided. Except for Districts No. 17 and No. 18, each of the regional

1. Each of the towns has a separate school system for kindergarten through sixth grade, administered by a town board of education.

boards of education has equal representation from each of the towns in the district.[2]

2. Connecticut Regional School Districts.

	Population 1970 Census	Population July 1, 1972 Estimate	Number of Children in Regional District Schools October 1, 1973	Representatives on Regional District Board
District #1				
Canaan	931	970	40	1
Cornwall	1177	1200	74	1
Kent	1990	2000	92	1
North Canaan	3045	3100	190	1
Salisbury	3573	3600	183	1
Sharon	2491	2300	143	1
District #4				
Chester	2982	3000	323	3
Deep River	3690	3900	393	3
Essex	4911	5100	445	3
District #5				
Bethany	3857	4100	557	3
Orange	13524	14000	1840	3
Woodbridge	7673	8000	1014	3
District #6				
Goshen	1351	1400	220	3
Morris	1609	1700	432	3
Warren	827	920	341	3
District #7				
Barkhamsted	2066	2300	262	2
Colebrook	1020	1000	125	2
New Hartford	3970	4000	495	2
Norfolk	2073	2100	228	2
District #8				
Andover	2099	2100	264	3
Hebron	3815	4300	591	3
Marlborough	2991	3300	363	3

(Footnote continued on next page)

(Footnote continued from preceding page)

	Population 1970 Census	Population July 1, 1972 Estimate	Number of Children in Regional District Schools Octber 1, 1973	Representatives on Regional District Board
District #9				
Easton	4885	5400	461	4
Redding	5590	6200	493	4
District #10				
Burlington	4070	4300	1240	4
Harwinton	4318	4500	1246	4
District #11				
Chaplin	1621	1700	204	3
Hampton	1129	1100	129	3
Scotland	1022	1000	121	3
District #12				
Bridgewater	1277	1400	323	3
Roxbury	1238	1300	268	3
Washington	3121	3200	641	3
District #13				
Durham	4489	4700	1461	4
Middlefield	4132	4200	990	4
District #14				
Bethlehem	1923	2000	502	4
Woodbury	5869	6300	1429	4
District #15				
Middlebury	5542	5800	1203	4
Southbury	7852	6700	1485	4
District #16				
Beacon Falls	3546	3700	946	4
Prospect	6543	6700	1636	4
District #17				
Haddam	4934	5200	1361	6
Killingworth	2435	2800	724	3
District #18				
Lyme	1484	1600	318	2
Old Lyme	4964	5300	1392	7

District No. 5 is administered by a regional board of education made up of three members from each town who are elected at town meetings, not at town elections.[3] At town meetings a moderator is chosen, and thereafter the meeting is conducted in accordance with parliamentary procedure. None of the general safeguards provided in Connecticut statutes dealing with general elections apply to town meetings.

Sections 10-39 through 10-63i of the Connecticut General Statutes deal specifically with regional school districts, and in addition a number of sections of Title 10, dealing generally with education, have application not only to town school boards but also to regional school boards. Under the statutory scheme, the administrative power over the district is divided between the board of education and the regional district meeting. C.G.S. §§ 10-47, 10-51. A regional district meeting is similar to a town meeting, except that all of the electors in each of the towns in the district are entitled to participate and vote at a regional district meeting. As at town meetings, the regional district meeting operates by electing a moderator and functioning like a parliamentary body. C.G.S. §§ 10-47, 10-51, 7-6, 7-7.

The primary document governing the activities and operations of District No. 5 is the annual budget. The budget is proposed by the regional board, and thereafter must be presented to a district meeting where "any person may recommend the inclusion or deletion of expenditures." After the public hearing, the regional board prepares the annual budget and submits it to the district meeting for approval or disapproval. If the budget is disapproved, the regional board must continue submitting the same or

3. Section 10-46 of the Connecticut General Statutes permits a town to elect members of the Regional Board of Education either in town elections or at town meetings. Bethany, Orange, and Woodbridge all have chosen the town meeting method.

revised budgets to subsequent district meetings until a budget is finally approved. C.G.S. § 10-51.

After the approval of the annual budget, neither the district nor the regional board has power to levy and collect taxes. The board merely allocates to each of the towns in the district its share of the budget in proportion to its number of pupils in the district schools, and the towns pay such amounts to the regional board. C.G.S. §§ 10-51, 10-51a.

The regional board also has no power to issue bonds. The regional district may issue bonds only if the issuance is approved by referendum in the regional school district. C.G.S. § 10-51.

This action was brought on April 4, 1974 by plaintiffs, who reside in Orange, seeking a declaratory judgment that the present apportionment of the regional board of education is unconstitutional, and certain injunctive relief. Jurisdiction is based on 28 U.S.C. § 1343(3) and (4). One of the plaintiffs, Mrs. George, became a plaintiff because the First Selectman of the Town of Orange (the First Selectman is the Town's chief executive officer) and the Chairman of the Democratic Town Committee asked her to become a plaintiff. The other plaintiff, Mr. Baker, the Republican Town Chairman of Orange, became a plaintiff because the Town had to have somebody who was complaining, and he was complaining. Just prior to the filing of the suit, the Board of Selectman of the Town of Orange announced that it had "authorized its attorneys" to bring the suit. The Town of Orange is paying for the suit. Neither of the plaintiffs spoke to their attorney prior to institution of the action. Mr. Baker did not see the complaint before the action was filed, and Mrs. George could not remember whether she first saw it before or after it was filed.

On May 9, 1974, plaintiffs moved for summary judgment. After hearing on June 12, 1974, Judge Newman filed his memorandum of decision on November 22, 1974, declaring

that the apportionment of the regional board was unconstitutional but denying injunctive relief. On January 3, 1975, Judge Newman made a determination and directed judgment in accordance with Rule 54(b), and judgment in favor of the plaintiffs on their claim for declaratory judgment was entered on January 8, 1975. On appeal, the Second Circuit affirmed.[4]

Reasons for Granting the Writ

In *Hadley* v. *Junior College District*, 397 U.S. 50 (1970), this Court held "that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will ensure, as far as is practicable, that equal numbers of voters can vote for proportionately equal numbers of officials." 397 U.S. at 56.

But since *Hadley*, it has not had before it a case giving it opportunity to explain what it meant by "popular election," to explain what it meant by "governmental func-

4. Decided with the instant case was *Scott* v. *Nonnewaug Regional School District No. 14*, which seeks reapportionment of the regional board of education of District No. 14, comprising the towns of Woodbury and Bethlehem, Connecticut. The *Scott* defendants are also planning to petition for a writ of certiorari.

Scott was decided on a stipulation of facts, some of which stipulated facts differ from the facts in the instant case. In *Scott*, the defendants have not raised the issues of whether the plaintiff is a proper party and whether the board members are elected by "popular election." Although the instant case and *Scott* were decided together in both courts below, they have never been consolidated under either Rule 42(a) of the Federal Rules of Civil Procedure or Rule 3(b) of the Federal Rules of Appellate Procedure.

tions," and to determine whether the *Hadley* holding has application at all in a case, such as this one, where the powers of the regional board of education are effectively controlled by the regional district meeting and by the referendum. These are important questions of federal law, because *Hadley* has potential application to more than 80,000 units of local government in the United States (*Avery* v. *Midland County*, 390 U.S. 474, 499-500 (1968)), and lower courts require guidance in determining the limits of its applicability. They are particularly important for the fourteen regional school districts in Connecticut (including District No. 5) which, as shown in the table in footnote 2, *supra*, have boards that will probably be reapportioned unless this Court reverses the decision of the Court of Appeals.[5]

a. *"Governmental functions."* In *Hadley*, this Court recognized that an analysis of the powers of the trustees was necessary in order to determine whether the "one person-one vote" principle applied. It said:

> Appellants argue that since the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college, their powers are equivalent, for apportionment purposes, to those exercised by the county commissioners in *Avery*. We feel that these powers, while not fully as broad as those of the Midland County Commissioners, certainly show that the trustees perform important governmental functions within the districts, and we think these powers are general enough and have sufficient impact through-

5. The contingency legislation referred to in footnote 2 of the decision of the Court of Appeals, Appendix I, *infra*, p. 3a, will not become effective unless and until this case and *Scott* are finally resolved in plaintiffs' favor.

> out the district to justify the conclusion that the principle which we applied in *Avery* should also be applied here. 397 U.S. at 53-54

It also described the powers of the county commissioners involved in *Avery* v. *Midland County*, 390 U.S. 474 (1968):

> The Midland County Commissioners established and maintained the county jail, appointed numerous county officials, made contracts, built roads and bridges, administered the county welfare system, performed duties in connection with elections, set the county tax rate, issued bonds, adopted the county budget, built and ran hospitals, airports, and libraries, fixed school district boundaries, established a housing authority, and determined the election districts for county commissioners. 397 U.S. at 53-54 n.6.

Avery and *Hadley* are the only two cases in which this Court has decided whether or not one person-one vote principles were applicable to a popularly-elected local governmental body.[6] This Court has never decided the important Constitutional question of what minimum kind and quantity of powers a local governmental body must have in order for one person-one vote principles to be applicable. Clearly there is some minimum, or this Court would not have compared in the *Hadley* opinion the powers of the *Hadley* trustees and the *Avery* commissioners, and commented that the powers of the Hadley trustees were "general enough and have sufficient impact throughout the dis-

6. Other cases, such as *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), *Salyer Land Co.* v. *Tulare Water District*, 410 U.S. 719 (1973), and *Associated Enterprises, Inc.* v. *Toltec District*, 410 U.S. 743 (1973) decided whether or not popular elections (rather than elections where only certain people could vote) were required for particular local governmental bodies; *Abate* v. *Mundt*, 403 U.S. 182 (1971) decided that the reapportionment plan for the local governmental body there involved met Constitutional standards.

trict" to make one person-one vote principles applicable.[7] In the absence of a minimum stated by this Court, lower courts have applied the principles of *Avery* and *Hadley* to numerous local governmental units, almost invariably holding one man-one vote principles to be applicable.

Whatever the minimum kind and quantity of powers required to make one person-one vote principles applicable, the regional board of education in this case must fall below it. It cannot adopt its budget; it cannot levy and collect taxes; it cannot issue bonds or otherwise borrow money except upon prior approval either by referendum in the district or by the regional district meeting; it cannot annex or otherwise add to the school district. Even the powers it does have, such as the power to acquire property for school purposes, the power to build schools and the power to enter into contracts, are severely circumscribed by its lack of taxing and borrowing power.

b. *Control by regional district meeting and referendum.* In the one person-one vote cases, the test under the Equal Protection Clause is whether there is "invidious discrimination." *Reynolds* v. *Sims*, 377 U.S. 533, 561 (1964), *Dusch* v. *Davis*, 387 U.S. 112, 116 (1967), *Salyer Land Co.* v. *Tulare Water District*, 410 U.S. 719, 725 (1973). But the discrimination alleged in this case, that the voters of Orange (which has 55% of the District's population) elect only 33⅓% of the members of the regional board of education, is not invidious, because the voters of the District, both through the regional district meeting (which has the sole power to adopt the annual budget and to approve certain borrowing) and through the referendum (necessary to approve bonding), effectively control the exercise of power by the regional board of education. Thus, although mem-

7. In addition, *Wells* v. *Edwards*, 409 U.S. 1095 (1973) affirmed a lower court's holding that one man-one vote principles did not apply to the judiciary.

bership on the regional board of education is not proportionate to population, this fact is not controlling here, because the regional district meeting and the referendum (at both of which one person-one vote prevails) cause any discrimination not to be invidious.

This Court has said that "the Constitution does not require that a uniform straightjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems," and that "the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government." *Avery* v. *Midland County,* 390 U.S. 474, 485 (1968). But it has never had an occasion to examine a mechanism whereby a representative body (the regional board of education) has its exercise of power effectively controlled by a democratic body, the regional district meeting,[8] or by its equivalent, the referendum. Such an examination, which the courts below failed to undertake, will show that the *Hadley* rule should not apply here.

c. *"Popular Election."* By its terms, *Hadley* is only applicable to officials elected by "popular election" (397 U.S. at 56), and it is clear that the *Hadley* Court understood "popular election" to mean an election in which "citizens participate individually by ballot." 397 U.S. at 54. "Ballot" means secret voting. Webster's Third New International Dictionary 168.

But in the instant case, the members of the regional board of education are elected at town meetings in each town.[9] At a town meeting, a moderator is chosen by the

8. Judge Swift, in his "System of the Laws of the State of Connecticut" (1795), speaks of the town meeting as "an epitome of a pure, unmixed, democracy." 1 Swift's System 116.

9. Under Connecticut law, members of regional boards of education may be elected either in town meetings or in town elections. C.G.S. § 10-46. In *Scott,* the parties stipulated merely that the members of their regional board were elected, without indicating how.

assembled electors of the town, and thereafter the meeting is conducted as if it were a parliamentary body. Nominations are from the floor, and voting is by voice vote or show of hands. Appendix I, *infra*, p. 5a, n.7. None of the usual attributes of popular election, such as primaries, absentee ballots, polls open for a period of time, voting machines or paper ballots,[10] and formal procedures for canvassing election results are applicable.

Although the same electors may participate and vote at a town meeting for election of members of the regional board of education as may vote in a town election, they do so in a different capacity. At a town meeting they are acting and voting as members of the municipal corporation, *Bloomfield* v. *Charter Oak Bank*, 121 U.S. 121, 129 (1887), rather than as individual voters as at a popular election. They are engaging in an exercise of pure democracy, 1 Swift's System 116 (1795), rather than of representative government. It is the institution of representative government, not pure democracy, that is the bedrock from which the one person-one vote principle springs. *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). Accordingly, one person-one vote principles should not be extended to the election at town meeting of members of the regional board of education.

2. This is really a suit by the Town of Orange, which chose the plaintiffs, announced through its Board of Selectmen that it had "authorized its attorneys" to bring the suit, and is paying for the suit.[11] Obviously the Town of Orange cannot itself complain that it is being deprived of equal protection in connection with voting rights, since it cannot

10. When petitioned for by 200 persons twenty-four hours before the meeting, voting machines or paper ballots must be used for voting on questions coming before the town meeting. C.G.S. § 7-7.

11. Since plaintiffs' motion for summary judgment was heard two months after the complaint was filed, there was little time for other occurrences showing that this is a suit by the Town of Orange.

vote, and there is a question as to whether the Town could even bring suit in a representative capacity. *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). Therefore it is understandable that the Town chose to bring the suit in the names of Mr. Baker and Mrs. George, two residents and electors of the Town.

Although defendants raised both in the District Court and in the Court of Appeals the interrelated issues of standing, justiciability, and jurisdiction, both Courts held for plaintiffs on these issues on narrow grounds. Appendix III, *infra,* p. 13a, n.5; Appendix I, *infra,* p. 4a, n.6. But neither Court dealt with those issues in the broader context in which defendant raised them: May and should the federal courts entertain a suit where a person or organization, such as the Town of Orange, wishes to assert constitutional rights which it does not itself possess, and therefore brings suit in the name of plaintiffs, such as Baker and George, who do possess those rights but are merely acting as agents or strawmen for the initiating organization. This Court has never decided this important question, although it has decided some closely related questions.

In *United States* v. *Beebe,* 127 U.S. 338 (1888), the United States had brought suit to set aside land patents issued by it many years earlier, which it alleged had been fraudulently obtained by the defendant. The suit had been brought at the behest of persons who claimed that they were entitled to the land. The defendant raised the defense of laches. This Court held that even though the United States had the right and duty to bring the suit to set aside the patent, and even though laches could not be raised as a defense against the United States, the persons who claimed to be entitled to the land were the real parties in interest and laches was therefore a good defense.

In *Cashman* v. *Amador & Sacramento Canal Co.,* 118 U.S. 58 (1886), a diversity case, the County of Sacramento

wished to bring suit in Federal Court, but, because there was no diversity, could not do so. It therefore solicited Cashman, an alien, who also had rights against the defendant, and entered into an agreement with him that it might bring suit in his name. This Court affirmed a dismissal for lack of jurisdiction under the predecessor of 28 U.S.C. § 1359.

N.A.A.C.P. v. *Button,* 371 U.S. 415 (1963) does not deal with the issue raised by petitioners here since it deals with the N.A.A.C.P.'s solicitation of plaintiffs in First Amendment terms.

The Courts below failed to focus on the question of whether plaintiffs are proper parties which is the essence of the doctrine of standing:

> The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wished to have adjudicated. . . . In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable. . . . A proper party is demanded so that federal courts will not be asked to decide 'ill-defined controversies over constitutional issues,' . . . *Flast* v. *Cohen,* 392 U.S. 83, 99-100 (1968)

This Court should resolve that question.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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J. Michael Eisner,
Attorneys for Petitioners.

Of Counsel:
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Frederick S. Moss

September 1975.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted

R. Lincoln Harvey,
J. Michael Galvin,
Attorneys for Petitioner.

Of Counsel:

Gerald P. Dwyer,
Lawrence R. Mann,

September 1973.

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 845, 898-99, 921-22—September Term, 1974.

(Argued June 6, 1975 Decided July 23, 1975.)

Docket Nos. 75-7001, 75-7009, 75-7015, 75-7039-40

JOHN E. BAKER and GERALDINE S. GEORGE,

Appellees,

v.

REGIONAL HIGH SCHOOL DISTRICT NO. 5, REGIONAL BOARD OF EDUCATION OF REGIONAL HIGH SCHOOL DISTRICT NO. 5, HENRY W. BENEDICT, JAMES BERRY, SIDNEY SVIRSKY and JEAN HANNA,

Appellants.

JOSEPH M. SCOTT, SR.

Appellee,

v.

NONNEWAUG REGIONAL SCHOOL DISTRICT NO. 14, *et al.*,

Appellants.

B e f o r e—SMITH, ANDERSON and OAKES, *Circuit Judges.*

Appeal from a decision of the United States District Court for the District of Connecticut, Jon O. Newman, *Judge,* which held on motion for summary judgment that certain Connecticut regional school boards performed a range of activities sufficiently extensive to require the application of one person-one vote principles. Held that not-

withstanding the fact that the boards in question could neither levy taxes nor issue bonds, their powers were governmental in nature, thus requiring that election to the boards be in accordance with one person-one vote principles.

OAKES, *Circuit Judge:*

At issue in this appeal is the applicability of one person-one vote principles (*Reynolds* v. *Sims*, 377 U.S. 533 (1964), and *Wesberry* v. *Sanders*, 376 U.S. 1 (1964)) to the election of school board members in two Connecticut regional school districts.[1] The districts in question are each comprised of towns with substantial population differences, but, as presently organized, each participating town has an *equal* number of elected representatives serving on the regional school board and voting with equal weight. The United States District Court for the District of Connecticut, Jon O. Newman, *Judge*, relying on *Hadley* v. *Junior College District*, 397 U.S. 50 (1970) (trustees of a junior college school district performing governmental functions must be elected in accordance with one person-one vote standards); *Avery* v. *Midland County*, 390 U.S. 474 (1968) (applying one person-one vote standards to the election of county officials); *Rosenthal* v. *Board of Education of Central High School District #3*, 497 F.2d 726 (2d Cir. 1974) (finding a substantial federal question presented by a requested application of one person-one vote principles to an elected school board which had the power to issue bonds and propose taxes); *Leopold* v. *Young*, 340 F. Supp. 1014 (D. Vt. 1972) (applying one person-one vote standards to a school board with substantial public functions),

1. A number of other districts throughout Connecticut will presumably be affected by this decision since most, although not all, of Connecticut's regional boards are not apportioned on the basis of one person-one vote. The statutes under which regional school districts were created did not require malapportionment, but permitted towns to agree among themselves on the terms of their consolidation.

held, on motion for summary judgment, that the school boards in question performed a range of governmental activities sufficiently extensive to require the application of one person-one vote principles.[2] We affirm.[3]

The facts presented by these two consolidated appeals are the same in all significant aspects. The school district in *Scott*, Connecticut Regional District No. 14 (Nonnewaug), is comprised of two towns, Woodbury (population 5,869) and Bethlehem (population 1,923). As of May, 1973, 1,887 pupils were attending the school district with 1,385 from Woodbury and 492 from Bethlehem. For each of the three years ending with 1973-74, Woodbury contributed to the regional district budget in an amount equal to two and one-half times the amount contributed by Bethlehem. Each of the towns, however, is equally represented on the regional school board by four members.

The school district in *Baker* is comprised of three towns, Bethany (population 3,857), Woodbridge (population 7,673), and Orange (population 13,524). The average[4] number of pupils in the district is 3,377, with 543 pupils from Bethany, 998 from Woodbridge and 1,835 from Orange. Orange contributed in 1972-73 55.04 per cent of

2. In fashioning a remedy for these constitutional violations, Judge Newman, whose opinion is unpublished, granted declaratory relief only. His denial of injunctive relief was premised on his unwillingness "to disrupt on-going educational activities pending legislative action." In response to Judge Newman's decision, we are advised, the Connecticut General Assembly has enacted contingency legislation which would apply one person-one vote principles to school districts, while providing that towns so inclined may withdraw from regional school districts. (H.R. Bill No. 6596.)

3. Jurisdiction is grounded upon 28 U.S.C. § 1343(3), and injunctive and declaratory relief was sought under 42 U.S.C. § 1983, 28 U.S.C. § 2201. A three-judge court is not required as there is no facial attack on the Connecticut statutes which create regional boards, and any special acts involved relate only to the particular district involved and hence are not of statewide applicability.

4. An average student census was compiled from the actual daily membership as of June, 1973; October, 1973; and February, 1974.

the total school budget, with Bethany's share amounting to 15.62 per cent and Woodbridge's 29.34 per cent. However, each of the three towns is equally represented on the regional board by three members. In both districts, the members of the boards are selected through an elective process.[5]

Plaintiffs-appellees in both *Scott* and *Baker* are residents, taxpayers and electors of Woodbury and Orange respectively,[6] who claim that the present apportionment on their regional boards of education dilutes their voting power and deprives them of the equal protection of the law. The critical question on this appeal therefore is whether these school boards are elective bodies performing regulatory functions of a kind that can be characterized as governmental. *Hadley* v. *Junior College District,* 397 U.S. at 53-54. An affirmative answer to this question requires the additional finding that the boards are constructed unconstitutionally, since all parties concede that their members are not elected according to strict one person-one vote principles, nor do they vote in accordance with any kind of weighted formula which would reflect the population differences in the towns they represent.

The towns in *Scott* elect members directly to the school board; the towns in *Baker,* however, maintain that their regional board is not elective in the sense the Supreme Court intended for application of the one person-one vote principle. The essence of this claim is that the board

5. See text at note 7 *infra.*

6. The *Baker* appellants maintain that this court's jurisdiction has been improperly invoked through "collusive joinder." Their theory seems to be that voters of the town are not the real parties in interest here. Fed. R. Civ. P. 17(a). It is, however, the electors whose vote is being diluted and as such their interests are quite properly before the court. This is clearly not a case where collusion has been used to manufacture diversity jurisdiction.

members are "appointed" through a "legislative" town meeting[7] rather than elected through a "popular election." We find no merit to this line of argument. While the forum for selecting board members was a town meeting, any person who was an elector of the town had the right to cast a vote at the meeting, and the majority prevailed. The suggested distinction is one of form, not substance.

On the question whether the board is governmental in character, appellants make much of the powers which the school boards lack. By reading *Hadley* v. *Junior College District* as narrowly as possible, they maintain that, since the Connecticut regional boards lack the powers to levy and collect taxes and to issue bonds, then their powers are not sufficiently broad or general to be governmental. But as Judge Newman recognized in his opinion below, "[t]he proper question is rather whether the power the Boards *do* have, in fulfilling what 'has traditionally been a vital governmental function,' *Hadley* v. *Junior College District*, 397 U.S. at 56, make it reasonable to describe the board members as 'governmental officials in every relevant sense of the term.' *Ibid.*"

The powers of Connecticut's regional school districts are detailed in what is now Chapter 164 of the Connecticut General Statutes,[8] with Conn. Gen. Stats. § 10-47 providing as follows:

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7. In the traditional town meeting, a moderator is chosen by the assembled electors of the town, and thereafter the meeting is conducted as if it were a parliamentary body.

8. The *Baker* appellants maintain that there are material facts in issue concerning the powers of the boards so as to preclude a summary judgment. Because the regional boards' powers are statutory and are for our purposes unambiguous summary judgment was properly rendered in the present case. *See Leopold* v. *Young*, 340 F. Supp. at 1015.

> Regional boards of education shall have all the powers and duties conferred upon boards of education by the general statutes not inconsistent with the provisions of this part. Such boards may purchase, lease or rent property for school purposes and, as part of the purchase price may assume and agree to pay any bonds or other capital indebtedness issued by a town for any land and buildings so purchased; shall perform all acts required to implement the plan of the committee for the transfer of property from the participating towns to the regional school district and may build, add to or equip schools for the benefit of the towns comprising the district. Such boards may receive gifts of real and and personal property for the purposes of the regional school districts. . . .

In the area of school financing, a regional board may authorize bond anticipation notes for periods of up to four years, and may treat the proceeds of the notes as other school districts or municipalities. Conn. Gen. Stats. § 10-56(c)-(d). In addition, the board may also borrow money for periods up to five years. Conn. Gen. Stats. § 10-60. While such actions by the board must be *approved* by the voters of the regional district in a referendum, it is or should be clear that this does not substantially undercut the significance of the boards' function. As stated in the amicus brief of the town of New Hartford, "*whether* to propose a bond ordinance, for what *purpose, when,* for *how much,* and in what *form* are all within the exclusive jurisdiction of the regional board." While the voters have the final word, what they ratify or disapprove can be only what the board decides to present to them. *See also Leopold* v. *Young, supra.*

Similarly, with respect to the budget-making process, the board has the exclusive power to initiate and propose. The voters may choose not to ratify, but it is within the sole power of the board to draw up the budget, and if it

is disapproved, the board then decides whether to amend and how to amend. Conn. Gen. Stats. § 10-51.

In addition, the regional school boards hire and fire teachers, supervise and discipline students, and in general manage all of the schools within their district.[9] As such, there can be no question but that the board members

> perform important governmental functions within the districts and . . . these powers are general enough and have sufficient impact throughout the district to justify the conclusion that [one person-one vote] should be applied here.

Hadley v. *Junior College District*, 397 U.S. at 53-54.

With respect to collective bargaining agreements, again the contract is negotiated by the board; a district meeting must ratify the board's action only if the chief executive officer of a constitutent town requests that a meeting be called. Conn. Gen. Stats. § 10-153d.

The power to tax is not a sine qua non to a determination that a local board serves a governmental function. The regulatory and supervisory powers possessed by the regional boards here at issue are sufficiently broad to be classified as governmental activity. *See generally Powers* v. *Maine School Administrative District No. 1*, 359 F. Supp. 30 (D. Me. 1973); *Leopold* v. *Young, supra.*[10]

Appellants' last line of argument focuses upon the Supreme Court's decisions in *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973).

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9. Nor is this a complete list of the boards' powers and duties. The boards also have duties in connection with school curriculum, transportation and a wide range of support services. In short, this is not a case like *Sailors* v. *Board of Education*, 387 U.S. 105 (1967), where an appointed school board, whose duties were largely administrative, was exempted from application of one person-one vote principles.

10. Nor does having the power to tax make a given body governmental in nature. *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973).

and *Associated Enterprises, Inc.* v. *Toltec Watershed Improvement District*, 410 U.S. 743 (1973), to diminish the force of *Hadley*. In *Salyer* and *Toltec* the Court held that one person-one vote principles did not apply to the election of members of the governing board of a California water and a Wyoming watershed district. Since the districts in issue in *Salyer* and *Toltec* had a "special limited purpose" and since the districts' action had a substantially "disproportionate effect . . . on landowners as a group," 410 U.S. at 728, 410 U.S. at 744, it was acceptable for the officers of the district to be elected by weighted vote of the district's landowners. The regional school boards' impact is general and related to all voters of the towns as such. In *Salyer*, the Court was careful to note that it was the land which was being benefited and the landowners only paying the costs; the Court also emphasized that the water district "provides no other general public services *such as a school.*" *Id.* at 728-29 (emphasis added). Here we have school districts in which those towns which are paying the most for the districts' support have to accept a diluted vote[11] in the running of the schools. *Salyer* and *Toltec* are simply not relevant. The boards here are elective bodies serving governmental functions. They must be organized to reflect one person-one vote principles.

Judgment affirmed.

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11. It is of no aid to appellants that the manner in which the regional boards were to be organized was voted upon and accepted by a majority of the voters of each of the towns in the district. As the Supreme Court held in *Lucas* v. *Forty-fourth General Assembly of Colorado*, 377 U.S. 713, 736-37 (1964):

> An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act.

Nor is the fact that the districts were formed pursuant to agreement of the towns. *See Leopold* v. *Young, supra.*

APPENDIX II

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of July one thousand nine hundred and seventy-five

Present—Hon. J. JOSEPH SMITH,
Hon. ROBERT P. ANDERSON,
Hon. JAMES L. OAKES, *Circuit Judges.*
75,7001, 75-7009, 75-7015, 75-7039, 75-7040.

JOHN E. BAKER, and GERALDINE S. GEORGE,

Appellees,

v.

REGIONAL HIGH SCHOOL DISTRICT NO. 5, REGIONAL BOARD OF EDUCATION OF REGIONAL HIGH SCHOOL DISTRICT NO. 5, MRS. MARION P. CROCCO, MR. GEORGE P. DAVIS, JR., MRS. JEAN VIRSHUP, MR. LOUIS KUTZNER, MRS. JEAN S. MIDDLETON, DR. FREDERICK STEIGERT, MRS. FRANK GRUSKAY, DR. HERBERT HERSHENSON, and MR. LEONARD LOHNE, individually and in their official capacities as members of the REGIONAL BOARD OF EDUCATION OF REGIONAL HIGH SCHOOL DISTRICT NO. 5, DOUGLAS J. SMITH, individually and in his official capacity as Acting Superintendent OF REGIONAL HIGH SCHOOL DISTRICT NO. 5, MR. FREDERICK ROSS, MR. HENRY W. BENEDICT, MR. HARRY I. WILSON, as Treasurers respectively of the Towns of Orange, Bethany, and Woodbridge, and MRS. MARJORIE B. WAHNQUIST, MR. SIDNEY SVIRSKY and MRS. JEAN HANNA, as Town Clerks respectively of the Towns of Orange, Bethany and Woodbridge,

Defendants,

REGIONAL HIGH SCHOOL DISTRICT NO. 5 and REGIONAL BOARD OF EDUCATION OF REGIONAL HIGH SCHOOL DISTRICT NO. 5, JAMES BERRY, as Treasurer of the Town of Woodbridge (succeeding HARRY I. WILSON, deceased)

Defendants-Appellants,

JOSEPH M. SCOTT, SR.,

Plaintiff-Appellee,

v.

NONNEWAUG REGIONAL SCHOOL DISTRICT NO. 14, THE TOWN OF WOODBURY, CONNECTICUT, THE TOWN OF BETHLEHEM CONNECTICUT, TOWN OF WOODBURY, and SAMUEL J. SWENDSEN, FIRST SELECTMAN, TOWN OF BETHLEHEM,

Defendants

NONNEWAUG REGIONAL SCHOOL DISTRICT NO. 14, TOWN OF BETHLEHEM,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

APPENDIX III

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. B-538
Civil No. N-74-75

JOSEPH M. SCOTT, SR.

v.

NONNEWAUG REGIONAL SCHOOL DISTRICT NO. 14, *et al.*,

JOHN E. BAKER, *et al.*

v.

REGIONAL HIGH SCHOOL DISTRICT NO. 5, *et al.*

MEMORANDUM OF DECISION

These motions for summary judgment present identical questions concerning the applicability of one person-one vote principles to boards of education of Connecticut's regional school districts. See generally, Conn. Gen. Stat. §§ 10-39 to 10-63i. Plaintiff in Civil No. B-538 (*Scott*), a resident, taxpayer, and elector of the Town of Woodbury, seeks the reorganization of the Board of Education of Nonnewaug Regional School District No. 14, which administers the joint elementary and secondary school systems of the Towns of Woodbury and Bethlehem.[1] In Civil No. N-74-75 (*Baker*),

1. Plaintiff Scott seeks to pursue the suit as a class action. Since "any equitable relief to which [plaintiff] may be entitled would benefit all persons similarly situated, there is no compelling reason to designate a class." *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Service Commission*, 354 F. Supp. 778, 783 (D. Conn. 1973), *modified on other grounds*, 482 F.2d 1333 (2d Cir. 1973). Class action designation is accordingly denied.

plaintiffs are residents, taxpayers, and electors of the Town of Orange, and they seek re-organization of the Board of Education of Regional High School District No. 5, which includes the Towns of Orange, Bethany and Woodbridge.

The defendants in *Scott* are Regional District No. 14, the chairman of the District's Board of Education, the Towns of Woodbury and Bethlehem, and the First Selectman of each Town.[2] In *Baker* the defendants are Regional District No. 5, its Board of Education and the members of the Board, the District's superintendent, and the treasurers and clerks of the Towns of Orange, Woodbridge and Bethany.

In addition, the Towns of Bethany and Woodbridge have moved to intervene as defendants in *Baker*. They argue that they have significant interests not adequately protected by the present defendants, and that only they are properly situated to protect the interests of their residents and electors.[3] However, the elected representatives of the voters who are already parties to this action are equal to that task. *Cf. Powers* v. *Maine School Administrative District No. 1*, 359 F.Supp. 30(D. Me. 1973); *Leopold* v. *Young*, 340 F.Supp. 1014 (D. Vt. 1972). The Towns as such do not have any substantial interest in the controversy; they are merely election districts from which board members are chosen. *Cf. Butterworth* v. *Dempsey*, 229 F.Supp. 754, 798-99 (D. Conn. 1964) (three-judge court), *aff'd sub nom. Town of Franklin* v. *Butterworth*, 378 U.S. 562 (1964). See *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). Moreover, an appropriately fashioned remedy will adequately protect the Towns. See 3A Moore's Federal Practice ¶ 19.07-2[2]. The motions to intervene are denied.

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2. The Town of New Hartford has moved to appear in *Scott* as *amicus curiae*. The motion is granted.

3. Other defendants have raised the same issue in the form of an affirmative defense alleging that the Towns are necessary parties without whose joinder the action cannot go forward, Fed. R. Civ. P. 19.

In both actions plaintiffs argue that the present apportionment of membership on their respective regional boards of education impermissibly dilutes their voting power and deprives them of the equal protection of the laws. They claim jurisdiction under 28 U.S.C. §1343(3), and request a variety of injunctive relief pursuant to 42 U.S.C. §1983. In *Scott* the parties have stipulated to the material facts,[4] and both actions are before the Court on motions for summary judgment.[5]

Preliminarily, the *Baker* defendants dispute this Court's jurisdiction and urge that a three-judge court must be convened to hear the suit. They rely primarily on Judge Tim-

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4. Defendants in *Baker* note that in their action the parties have not entered into a stipulation and urge that summary judgment is inappropriate because a triable issue of fact is presented by disagreement about the powers of their Board. There is no dispute, however, that the powers of the Boards are defined by the Connecticut General Statutes, compare *Education/Instruccion, Inc.* v. *Moore*, F.2d (2d Cir. 1974), Slip op. at 5321 (August 21, 1974) (Oakes, J. dissenting); the only disagreement is whether as a matter of law the powers conferred by statute are sufficient to bring the Boards within apportionment requirements.

5. The *Baker* defendants oppose summary judgment on the ground that the plaintiffs are not real parties in interest, Fed. R. Civ. P. 17(a), and on the additional ground that jurisdiction of this Court has been invoked by "improper or collusive joinder," 28 U.S.C. § 1359. Rule 17(a) is designed to make certain that an action is brought by one who, by the substantive law, has the right sought to be enforced. *Rackley* v. *Board of Trustees of Orangeburg Regional Hospital*, 35 F.R.D. 516 (E.D. S.C. 1964); 3A Moore's Federal Practice ¶ 17.07, text at n. 1. But as this opinion explains, text following n. 2, *supra*, the right sought to be protected in this case is that of the Orange electors in an undiluted vote. Section 1359 is similarly designed to prevent collusive attempts to "manufacture" diversity jurisdiction, *O'Brien* v. *Avco Corporation*, 425 F.2d 1030 (2d Cir. 1969). It thus has no application in the present context. Moreover, even if, as defendants allege, officials of the Town of Orange solicited plaintiffs' participation, and even if the Town of Orange is paying the expenses of the litigation, it does not follow that there has been the kind of "collusion" at which the statute is directed *Allstate Ins. Co.* v. *Lumbermens Mutual Casualty Co.*, 204 F.Supp. 83 (D. Conn. 1962).

bers' tentative opinion in *Giordano* v. *Amity Regional High School District #5*, 313 F.Supp. 403 (D. Conn. 1970). The simple answer to this claim is one not raised by the parties in *Giordano* (although recognized as persuasive by Judge Timbers, 313 F.Supp. at 408-09, n. 9), but pressed strenuously by all plaintiffs in the present actions. Plaintiffs here do not seek to enjoin enforcement of a statute of statewide application. Compare *Hadley* v. *Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 57 (1970), with *Leopold* v. *Young*, 340 F.Supp. 1014, 1017 (D. Vt. 1972). The Connecticut statutory system at issue "does not require malapportionment, but only permits towns to agree among themselves on the terms under which they will consolidate, including the apportionment of school board members." *Ibid.* See *C. Wright, Handbook of the Law of the Federal Courts* 190, text at n. 21 (1970).

The situation is no different as to Special Act 74-69, regardless of the interpretation placed on it. If, as plaintiffs urge, it merely sets the time at which board members will take office, there is no question of enjoining its enforcement. And even if, as defendants urge, it represents a "fixing" of the present apportionment of board members, it applies by its terms only to District No. 5 and is therefore not a statute of statewide application.

Moreover, as the remainder of this opinion makes clear, the law has progressed considerably since *Giordano*, and what Judge Timbers concluded was a question requiring three judges for resolution is now so clearly settled that the issue lacks the substantiality requiring a three-judge court. In such circumstances a single judge possesses the power to dispose of the case. *Bailey* v. *Patterson*, 369 U.S. 31 (1962); *Anderson* v. *Nemetz*, 474 F.2d 814 (9th Cir. 1973); *Consumer Party* v. *Tucker*, 364 F.Supp. 594, 604 (E.D. Pa. 1973). See *Utica Mutual Ins. Co.* v. *Vincent*, 375 F.2d 129, 131 n. 1 (2d Cir. 1967).

Regional District No. 14 began operating on July 1, 1968, having been approved several months earlier by separate referenda conducted in Woodbury and Bethlehem. The District's board consists of eight members, with four chosen by the electors of each of the two member towns. Plaintiff Scott bases his objection to the equal division of the membership on a comparison of the populations of the two communities. According to the 1970 census, Woodbury's population was 5,869 and Bethlehem's was 1,923, and of the 1,887 pupils attending school in the District as of May, 1973, 1,385 were from Woodbury and 492 were from Bethlehem. Finally, for each of the three consecutive academic years ending with 1973-74, Woodbury's contribution to the Regional District's budget was approximately two and one-half times as large as Bethlehem's. In short, plaintiff complains that Woodbury has roughly 75% of the joint district's population and pupils, and contributes a similar proportion of the joint district's budget, but has only 50% of the votes on the body that administers the District.

The comparable statistics for District No. 5, which commenced operations in the 1952-53 academic year, reflect a similar imbalance. Orange, the largest of the three towns, has approximately 55% of the population, 55% of the student body, and contributes 55% of the District's budget. Bethany accounts for approximately 15% of each category, and Woodbridge 30%. Each Town, however, elects three members of the nine-member joint Board of Education.

Defendants do not dispute the contention that the votes of the Woodbury and Orange electors are in fact substantially diluted. *Cf. Powers* v. *Maine School Administrative District No. 1, supra,* 359 F.Supp. at 35. Nor do they seriously contest the proposition that because the members of the Regional Boards are chosen by election[6] the one per-

6. The *Baker* defendants do suggest that the town meetings from which their Board members are elected are exercises of legislative

son—one vote rules must apply. *E.g., Hadley* v. *Junior College District of Metropolitan Kansas City,* 397 U.S. 50, 54 (1970); *Rosenthal* v. *Board of Education of Central High School District No. 3 of Town of Hempstead,* 497 F.2d 726, 729 (2d Cir. 1974).

On the merits of the motions for summary judgment defendants press only two contentions. The first is that the Regional Boards whose composition is at issue perform an insufficiently broad range of governmental functions and are therefore not the type of elective bodies to which apportionment requirements apply. Compare *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District,* 410 U.S. 719, 728-29 (1973). Both Regional Boards lack several significant powers that were possessed by the junior college board of trustees in *Hadley,* and defendants contend that these were essential both in *Hadley* and in similar cases. These include the power to levy and collect taxes, to issue bonds, and to pass on petitions to annex school districts and acquire property by condemnation.

Defendants' approach, enumerating the powers that these Regional Boards lack, is misconceived. *Cf. Hadley* v. *Junior College District, supra,* 397 U.S. at 53-54; *Rosenthal* v. *Board of Education, supra,* 497 F.2d at 728. The proper question is rather whether the powers the Boards *do* have in fulfilling what "has traditionally been a vital governmental function," *Hadley* v. *Junior College District, supra,*

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power and not "popular elections" within the meaning of *Hadley,* and that one person-one vote requirements for that reason do not apply. Defendants do not dispute, however, that in each member town all registered voters are eligible to vote for board members, Conn. Gen. Stat. § 10-46(b). Nothing in *Hadley* indicates that the Court intended to limit its holding to elections of a particular type. On the contrary, Justice Black took pains to observe that at the center of each of the Supreme Court's reapportionment cases was "the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions." 397 U.S. at 54. To accept the consequences of defendants' characterization would be to exalt form over substance at the expense of the right to vote.

397 U.S. at 56, make it reasonable to describe the board members as "government officials in every relevant sense of that term." *Ibid.*

With the question thus posed, the answer becomes clear. The powers of the two Boards before this Court do not differ significantly from those of the Board in *Rosenthal, supra,* and the only question that troubled the Court of Appeals in *Rosenthal* was whether the manner of selection of board members was more nearly elective than it was appointive; it was obvious to the Court that if the board members were elected, their powers were sufficiently governmental to invoke one person-one vote requirements. 497 F.2d at 729, text at n. 10. As the Court of Appeals has more recently observed, "there was no question [in *Rosenthal*] that the body in question performed substantial governmental functions."[7] *Education/Instruccion, Inc.* v. *Moore,* —— F.2d ——, —— (2d Cir. 1974), Slip op. at 5320 (August 21, 1974). Compare, *e.g., Dameron* v. *Tangipahoa Parish Police Jury,* 315 F.Supp. 137, 138 (E.D. La. 1970). See also, *Regional High School District No. 3* v. *Town of Newtown,* 134 Conn. 613, 620-21 (1948).

Defendants' second argument relies on dictum in *Avery* v. *Midland County,* 390 U.S. 474 (1968). They suggest that regional districts are a form of educational innovation and are for that reason immune from judicial interference, even interference in the name of equal protection. Defendants contend that requiring equal apportionment will make it unlikely that smaller towns will join regional districts, and that a legitimate attempt by the State to provide for more efficient operation of schools and improved educational opportunity for students will thereby be frustrated.

In *Avery,* which held that elections for County Commissioners Court in Texas must be conducted in accordance

7. The *Rosenthal* Board also lacked the power to set taxes. 497 F.2d at 728, n. 7 and accompanying text.

with principles of voting equality, the Supreme Court acknowledged in passing that local governments are under immense pressures to solve local problems, and denied that such experimentation is foreclosed by the Constitution. The two cases cited by the Court, however, indicate that these observations were in no way intended to encourage retreat from the Constitutional imperative. *Sailors* v. *Board of Education,* 387 U.S. 105 (1967), exempted a board whose members were appointed and whose duties were administrative, and in *Dusch* v. *Davis,* 387 U.S. 112 (1967), the Court upheld residence requirements imposed on the *members* of a multicounty legislative body, finding that the voting power of the *electors* of the component counties was not diluted. Defendants express a legitimate concern in urging that there be no needless thwarting of experimentation with regional arrangements in general or in the field of education in particular. The desirability of such arrangements, however, cannot suspend the Fourteenth Amendment's apportionment requirements. If regional school districts are to be encouraged, it will have to be done by creative legislative authorization and cooperative local arrangements that resolve the competing large and small town interests within Constitutional standards. Although the Constitution leaves a great deal of room for legitimate experimentation and innovation, it also "imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among . . . districts of substantially unequal population." *Avery* v. *Midland County, supra,* 390 U.S. at 485-86.

The only question remaining is one of remedy. Plaintiffs in both actions have requested a broad range of coercive injunctive relief, both permanent and interlocutory. Plaintiffs have clearly established that they are entitled to a

declaratory judgment, but it does not follow that the requested permanent mandatory injunction is also appropriate at this time. While it is true that the violations could be cured without legislative action, compare *Hadley* v. *Junior College District, supra,* the relatively few options presently available to defendants were designed by a legislature that may well have thought that regional districts would be free from one person-one vote requirements. Respect for the pre-eminence of the states in matters of educational policy requires, therefore, that the legislature be given a reasonable opportunity to develop new alternatives in light of this Court's declaration before an injunction issues requiring defendants to act. *Cf. Powers* v. *Maine School Administrative District No. 1, supra.* For example, the legislature may want to consider the procedures for forming new districts and for dissolving, or permitting withdrawal from, present districts now that one person-one vote principles are applicable. The General Assembly is to convene in January and should have at least two months to consider whether it wishes to frame legislation responsive to the concerns of these and other aspects of regional districts. Permanent injunctive relief will therefore be denied, without prejudice to a renewed application after March 1, 1975. At any time prior to that date, any parties may submit to the Court their proposals for reapportionment plans and implementation procedures, which the Court will review before formulating a final decree after March 1, 1975.

With respect to the requests for interim relief pending entry of a final decree, the Court is not willing needlessly to disrupt on-going educational activities pending legislative action. The requested decrees would work a substantial departure from the status quo, and the request for such relief is therefore denied. Plaintiffs are free to seek supplemental interim relief if it should appear that the

Regional Districts are about to undertake substantial building programs or make other substantial capital commitments.

Accordingly, plaintiffs' motions for summary judgment are granted,[8] and judgment will enter declaring that the allocation of membership on the Boards of Education of Nonnewaug Regional School District No. 14, and of Regional High School District No. 5, deprives plaintiffs of the equal protection of the laws in violation of the Fourteenth Amendment.

Dated at New Haven, Connecticut, this 22 day of November, 1974.

JON O. NEWMAN
United States District Judge

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8. The motion of defendants in *Scott* is correspondingly denied.

APPENDIX IV

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. B-538
Civil No. N-74-75

JOSEPH M. SCOTT, SR.

v.

NONNEWAUG REGIONAL SCHOOL DISTRICT NO. 14, *et al.*,

JOHN E. BAKER, *et al.*,

v.

REGIONAL HIGH SCHOOL DISTRICT NO. 5, *et al.*

JUDGMENT

The above cases having come on for consideration by the Court on plaintiffs' Motions for Summary Judgment and the Court having rendered its Memorandum of Decision, under date of November 22, 1974, granting said motions; and the Court having rendered its Ruling on Request for Rule 54(b) Certification, under date of January 3, 1975, finding that there is no just reason for delay and specifically directing the Clerk to enter judgment on the claims for declaratory relief,

It is ORDERED and ADJUDGED that judgment be and is hereby entered declaring that the allocation of membership on the Boards of Education of Nonnewaug Regional School Dis-

trict No. 14, and of Regional High School District No. 5, deprives plaintiffs of the equal protection of the laws in violation of the Fourteenth Amendment.

Dated at New Haven, Connecticut, this 8th day of January, 1975.